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IN THE
Supreme Court of the United States

GLENN G. GODFREY and BRUCE M. BOTELHO,
Petitioners,

v.

JOHN DOE I, JANE DOE, and JOHN DOE II,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL GOVERNORS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Alaska's Sex Offender Registration Act violates the *ex post facto* clause of the Constitution.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members included state, county and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

The incidence of sex crimes is a matter of great public concern. Sex crimes frequently impose both physical injury and emotional trauma on their victims. While the States have greatly increased their prosecution efforts, most sex offenders are eventually released to the community. Studies have found that a substantial number of sex offenders will reoffend following their release and that reoffending can occur as much as twenty years later. One report concludes that "many sex offenders commit a wide range and large number of sexually deviant acts during their lives and show a continued propensity to reoffend." Kim English *et al.*, U.S. Dep't of Justice, *Managing Adult Sex Offenders in the Community - A Containment Approach* 2 (1997)

"Sex crimes flourish in secrecy." *Id.* Every State has therefore enacted a statute requiring registration and authorizing public disclosure of relevant sex offender information. These statutes support an important national scheme to track the whereabouts of released sex offenders.

The court of appeals held that the application of Alaska's Sex Offender Registration Act to offenders who committed their crimes before this law's enactment imposes additional punishment in violation of the *ex post facto* clause. This

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity other than *amici* or their members made a monetary contribution toward its preparation or submission.

holding is manifestly erroneous. If affirmed, it would undermine the ability of the States to protect their citizens from recidivist sex offenders.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. Sex offenses impose an extraordinary toll on society. In addition to the costs of medical and mental health care, such crimes impose on their victims both physical injury and great emotional trauma. State and local governments have a compelling interest in reducing the high incidence of sex crimes and in protecting citizens from becoming victims of such crimes.

Numerous studies have found that a substantial portion of convicted sex offenders commit new sex offenses following their release to the community. For example, a study of released child molesters found a 52 percent failure rate for committing a new sex offense over a twenty five-year period. *See* Robert Prentky *et al.*, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 Law & Hum. Behav. 635, 643 (1997). Moreover, in several studies in which sex offenders were interviewed, they admitted to committing vastly more sex offenses than those for which they were arrested. Research has also established that some sex offenders re-offend twenty years following their release.

While some sex offenders do not reoffend, many do. Predicting whether a particular sex offender is likely to re-offend is, however, a matter of great complexity as there are numerous factors of both a static and dynamic nature that may be relevant to the prediction. The difficulty of making such predictions is compounded by the evolving and sometimes inchoate nature of the criminological and scientific research.

State legislatures are not required to wait for the scientific and criminal justice communities to conclusively analyze every category of sex offense and every nuance of the problem of recidivism and to compile more perfect data-sets before acting to protect their citizens. *See Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997). In any event, "[t]he prediction of future behavior can never be done with certainty since people and circumstances can and do change." R. Karl Hanson, *The Development of a Brief Actuarial Risk Scale for Sexual Offense Recidivism* 2 (1997).

2. ASORA is a regulatory program which does not impose additional punishment under the *ex post facto* clause. As the court of appeals acknowledged, the Alaska legislature "acted with a non-punitive intent" when it enacted ASORA. Pet. App. 11a. Nor have respondents shown by "the clearest proof" that ASORA is "so punitive . . . in . . . effect as to negate [the State's] intention to deem it civil." *Kansas v. Hendricks*, 521 U.S. at 361 (internal quotations and citation omitted). Indeed, the Court has explained that "when a legislature undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation." *Id.* at 360 n.3 (internal quotation and citation omitted). Because the court of appeals disregarded these principles and improperly substituted its own policy preferences for those of the Alaska legislature, its judgment should be reversed.

The court of appeals discounted the State's remedial interests in protecting its citizens from sex crimes. In its view, ASORA is punitive because it is "so broad and sweeping." Pet. App. 30a. The court particularly noted that ASORA imposes a "substantial disability" on sex offenders and that the statute is excessive because of both the "severity of the disabilities it imposes" and because it subjects all offenders to internet disclosure without providing individualized risk assessments. *Id.* at 28a-30a.

The court of appeals asserted that ASORA imposes a "substantial disability" because it "require[s] in-person registration at a local police station . . . four times each year for life in the case of some defendants." *Id.* at 28a. The court likened this requirement to the conditions typically imposed on offenders placed on probation or granted parole. Both the plain text of ASORA and informational materials published by the State make clear, however, that after the initial registration, quarterly verifications may be done by mail. The court's reasoning is thus based on a patently erroneous reading of the statute. Moreover, ASORA's requirements do not remotely approach the onerous conditions typically imposed on an offender as a condition of probation or parole.

ASORA also does not prohibit an offender from voting, holding public office, or bar an offender from a profession or holding an occupational license. While compliance may in some instances result in the loss of certain employment opportunities, the entries of numerous registered sex offenders indicate that they have obtained employment. And insofar as some sex offenders are denied certain employment opportunities, this condition does not arise from a statutory prohibition on employment but from the decisions of private employers. ASORA is thus "certainly nothing approaching the infamous punishment of imprisonment." *Hudson v. United States*, 522 U.S. 93, 104 (1997) (other citations and internal quotations omitted).

Nor is there any merit to the court of appeals' contention that ASORA imposes a disability because it "exposes all registrants to world-wide obloquy and ostracism." Pet. App. 28a-29a. The court ignored that the information obtainable from Alaska's website relates the historical fact of a conviction obtained through procedures that provide substantial safeguards. Moreover, the court did not explain how those persons who live outside of Alaska and have no contact with an offender can engage in ostracism by viewing the

website or how an offender can feel ostracized by persons thousands of miles away with whom he has never had contact.

3. ASORA is not punitive by virtue of the fact that it does not provide individualized risk assessment. Individualized risk assessment is not constitutionally required in sex offender registration and disclosure schemes. *Cf. Hendricks*, 521 U.S. at 360 n.3.

There is substantial research questioning the accuracy of clinical predictions of sex offenders' risk of reoffending. Moreover, while it has been suggested that actuarial methods of risk assessment are superior to clinical predictions, the subject remains controversial in the scientific community. While substantial advances have been made in actuarial risk assessment with respect to the prediction of general criminal recidivism, "these general measures have not been particularly effective in predicting sexual recidivism." R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment*, 4 Psychol., Pub. Pol'y & L. 50, 52 (1998). In part, this is because "[t]here has been relatively little empirical research on how best to combine risk factors for sexual offenders." *Id.* at 62. Given the uncertainty that exists in the area of predicting sex offense recidivism and the evolving nature of the research, a State can elect to make relevant information available to its citizenry without individualized risk assessment. That Alaska does so does not make its scheme punitive.

I. PROTECTING CITIZENS FROM SEX CRIMES IS A COMPELLING CONCERN OF STATE AND LOCAL GOVERNMENTS

A. Sex Crime Is A Social Problem Of Extra-ordinary Magnitude

The incidence of sex crimes is a matter of great public concern. State and local governments have a compelling interest in reducing the high number of these crimes, which impose enormous harm on their victims.

It is widely acknowledged that government statistics underreport the level of sex crimes. *See* Robert A. Prentky *et al.*, U.S. Dep't of Justice, *Child Sexual Molestation: Research Issues* 1 (1997) (noting that "[t]he assumption that sexual crimes against children and teenagers are under-reported is now commonly accepted"). Various studies have concluded that the number of such offenses is enormous. *See, e.g.*, Ted R. Miller *et al.*, U.S. Dep't of Justice, *Victim Costs and Consequences: A New Look* 2-3 (1996). For example, the Miller study (which reviewed other studies) estimated that from 1987 through 1990, children were the victims of an annual average of 71,000 rapes and 114,000 acts of other forms of sexual abuse. *See id.* at 3. Adults were the victims of 1,133,000 rapes and sexual assaults. *See id.*; *see also id.* at 5 (noting study that surveyed adult women finding that in 1990, 683,000 women were raped, but which did not include rapes of persons under the age 18 or of males).

Sex offenses impose on their victims substantial costs of both a tangible and intangible nature. *See id.* at 9, 14-15. Beyond the costs of medical and mental health care, such crimes can cause both physical injury and great emotional trauma. As another report explains, "the trauma associated with sexual assault include shame, self-blame, fear, developmental crises, post-traumatic stress disorder, and the

threat or actuality of physical violence, terror, and injury." Kim English *et al.*, U.S. Dep't of Justice, *Managing Adult Sex Offenders in the Community - A Containment Approach* 1 (1997). Moreover, "what might be regarded by some as a relatively minor type of sexual assault (e.g., 'just fondling') can be extremely traumatic to a victim who trusted the perpetrator." [2] *Id.*

Most troubling, in several studies sex offenders have admitted to "vastly more" criminal paraphilic acts "than those for which they were convicted." Prentky, *Child Sexual Molestation*, at 1. In one study, which conducted confidential interviews with 561 non-incarcerated paraphiliacs, 224 of the subjects reported committing 5,197 acts of non-incestuous child molestation against 4,435 female victims and 153 of the subjects reported committing 43,100 acts against 22,981 male victims. *See* Gene G. Abel *et al.*, *Self-Reported Sex Crimes of Nonincarcerated Paraphiliacs*, 2 J. Interpersonal Violence 3, 19 (1987). With respect to incestuous acts, 159 of the study's subjects reported committing 12,927 acts of incest against 286 female victims and 44 subjects reported committing 2,741 acts of incest against 75 male victims. Finally, 126 of the subjects reported committing 907 acts of rape against 882 victims. *See id.*[3]

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[2] According to a recent Justice Department report, 34.2% of child sexual assaults were committed by a family member of the victim; another 58.7% were committed by acquaintances of the victim. *See* U.S. Dep't of Justice, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics* 10 (2000) (Table 6). With respect to children under the age of 12, the rate of sexual assault by family members is even more pronounced: 48.6% of sexual assaults on children under age 6 were committed by a family member and 42.4% of sexual assaults on children ages 6 to 11 were committed by a family member. *Id.*

[3] One hundred forty-two of the study's subjects admitted to 71,696 acts of exhibitionism. *See* Abel, *Self-Reported Sex Crimes*, at 19.

Another study of 23 rapists and 30 child molesters participating in a treatment program also indicates that sex-offenders commit far more sex offenses than they are arrested for. While "the rapists had an average of less than two arrests each, they collectively admitted to more than 5,000 offenses including 319 child molestations and 178 rapes." Virginia Criminal Sentencing Commission, *Assessing Risk Among Sex Offenders in Virginia* 43 (2001) (discussing Robert E. Freeman-Longo & Geral T. Blanchard, *Sexual Abuse in America: Epidemic of the 21st Century* (1998)). Moreover, while the 30 child molesters had "an average of only 1.5 arrests each," they "admitted to over 20,000 acts, including nearly 6,000 child molestation offenses and 213 rapes of adult women." *Id.* Finally, using polygraphy as part of its treatment program, the Colorado Dep't of Corrections found that "while official records indicated an average of only two victims per offender," the offenders admitted to an "average 184 victims per inmate." *Id.* As one report concludes, "[m]any sex offenders commit a wide range and large number of sexually deviant acts during their lives and show a continued propensity to reoffend." English, *Managing Adult Sex Offenders in the Community*, at 2.

In response to the problem of sex crimes, the States have substantially increased their prosecution efforts. Since 1980, the States have "more than doubled" the annual rate of conviction for rape, child molestation, and sexual assault and are now incarcerating more than four times as many sex offenders as they did in 1980.[4] *See Managing Adult Sex Offenders*, at 1; U.S. Dep't of Justice, *Correctional Populations in the United States, 1997* 6 (2000) (table 1.13).

[4] Between 1980 and 1992, "the number of adults convicted annually of rape, child molestation, or other forms of sexual assault more than doubled" from 8,000 to 19,100. *Managing Adult Sex Offenders*, at 1. Between 1980 and 1994, the number of sex offenders in state prisons increased from 20,500 to 88,100. *See id.*

Nonetheless, "[t]he vast majority of sex offenders are released eventually" to the community. Prentky, *Child Sexual Molestation*, at 8.

A large body of research supports the conclusion that a substantial portion of released sex offenders will reoffend. *See Assessing Risk Among Sex Offenders in Virginia* at 17-18 (listing numerous studies). For example, a study, discussed more fully below, found that 115 treated child molesters had a 52 percent failure rate over a 25-year period when measured by a re-arrest for a new sex offense. *See* Robert Prentky *et al.*, *Recidivism Rates Among Child Molesters and Rapists: A Methodological Analysis*, 21 Law & Hum. Behav. 635, 643-44 (1997).[5] The same study tracked 136 rapists over the same period and found a 39 percent failure rate when measured by a re-arrest for a new sex offense. *Id.* at 635, 642-43. Another study of 191 child molesters (which followed 93% of the molesters for more than 15 years) found a 35% rate of reconviction for a new sex offense. R. Karl Hanson *et al.*, *A Comparison of Child Molesters and Nonsexual Criminals: Risk Predictors and Long-Term Recidivism*, 32 J. Res. in Crime & Delinq. 325, 332 (1995). As demonstrated by these studies, as well as the studies of self-reported victimizations, *see* discussion *supra* at 7-8, state and local officials have a justifiably compelling concern that released sex-offenders will engage in recidivist acts.

This is not to deny the existence of research suggesting lower recidivism rates than those cited above, *see Assessing Risk Among Sex Offenders in Virginia*, at 17-18 (listing studies), or that the "[t]he literature on sex offenders shows considerable variability in estimates of recidivism rates." Prentky, *Child Sexual Molestation*, at 11. There are,

[5] "Failure rate is an estimate [of recidivism] that takes into account the amount of time each offender has been on the street and thus able to reoffend." Prentky, *Recidivism Rates*, 21 Law & Hum. Behav. at 641. *See* discussion *infra* at pp. 11-12 n.7.

however, substantial "methodological differences in existing studies." *Id.* at 10. Such factors as "differences in the definition of 'reoffense,' in the type of criminal offense indexed, and in the length of the exposure period being considered" contribute to "this variability." *Id.*

These methodological differences do not, however, support the Does' assertion that "recidivism statistics are far too unreliable" to support ASORA. Reply Br. for Appellants at 4, *Doe v. Otte* (9th Cir.). To the contrary, most of these factors result in the *underestimation* of recidivism rates.

For example, a study which measures recidivism based on convictions for a new sex offense will have lower rates than one which measures recidivism based on arrests. An offender, however, may be acquitted because witnesses "may refuse. . . to testify" or the charge may be "reduced in a plea agreement." *Assessing Risk Among Sex Offenders in Virginia* at 7; *see also* Prentky, *Child Sexual Molestation*, at 11. Moreover, since many sex offenses are never reported to law enforcement authorities (and even if reported, the perpetrator may not be identified or caught), there is an inherent bias towards lower recidivism rates in most studies. *See* Prentky, *Recidivism Rates*, 21 Law & Hum. Behav. at 641. As the American Psychiatric Association's Task Force explains, "[s]exual offenses are grossly underreported, and for this reason most measures of recidivism or treatment outcome are flawed." American Psychiatric Association, *Dangerous Sex Offenders* 129 (1999); *see also id.* at 132-33 ("official arrest rates do not reflect the actual number of acts committed by any paraphilic individual"). Thus, while "rearrest rates and reconviction rates are frequently used, the most accurate, although potentially still flawed, outcome variable may be a combination of these rates and self-reported sexual behaviors that are present in only a few of the reported studies." *Id.* at 129.

Moreover, most studies use finite periods to calculate recidivism rates and express the rate as a "simple . . . proportion of individuals who have reoffended during the study period;" a shorter period will result in a lower rate as the study excludes those who reoffend after the end of the period. Prentky, *Recidivism Rates*, at 641.[6] Furthermore, because discharged offenders have different release dates and some offenders will commit new crimes and be re-incarcerated, all study subjects are not "on the street and thus able to reoffend" for the full study period. *Id.* Thus, recidivism studies which use "simple percentages" will "*underestimate* the rate of recidivism." *Id.*; *see also* Prentky, *Child Sexual Molestation*, at 11.

To show how many studies underestimate recidivism, one study followed 115 child molesters and 136 rapists who were released over a 25-year period from the Massachusetts Treatment Center for Sexually Dangerous Persons after "being found no longer sexually dangerous." Prentky, *Recidivism Rates*, at 637. In addition to using the traditional method of simple percentages, the study used survival analysis to determine the probability that a released offender would either be charged with, convicted of, or imprisoned for a new sex offense over the study period. *See id.* at 650; *see also* Prentky, *Child Sexual Molestation*, at 11-14. Using the arrest data, the study estimated that at 25 years there was a 52 percent failure rate[7] for committing a new sexual offense,

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[6] Indeed, four-fifths of the studies were based on a one-year period. Prentky, *Recidivism Rates*, at 636.

[7] As the Prentky study explains, "[r]ecidivism may be operationalized in a variety of different ways. . . . [T]he most common method is to report the simple proportion of individuals known to have reoffended during the study period." *Recidivism Rates*, at 641. "This method will *underestimate* the rate of recidivism, because some of those individuals who were in the community for a briefer period of time may still reoffend." *Id.* Another method is to calculate the failure rate, which "is an estimate that takes into account the amount of time each offender has been on the street and thus

with an average of 3.64 years before reoffense; using the conviction data, it estimated a 41 percent failure rate; and using the imprisonment data, it estimated a 37 percent failure rate.[8] *See* Prentky, *Recidivism Rates*, at 643-44; *see also* Prentky, *Child Sexual Molestation*, at 12-13.

Most significantly, the study found that "[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release [and that] child molesters in [the] sample reoffended as late as 20 years following release." *Id.* at 14. The study further concluded that if it "had been restricted to the conventional exposure period of 12 to 24 months, approximately 40 to 45 percent of new sexual charges whould have been missed [and even] if followup had been extended to 60 months, 30 percent of new sexual charges would still have been missed." *Id.*[9] While the study advises that the "marked heterogeneity of sexual offenders precludes automatic generalizations of [these] rates . . . to other samples," and that "actual rates may differ considerably depending on the composition of the sample," it nonetheless recognizes "the proclivity of a core subgroup of sexual

able to reoffend. . . . [P]rocedures that take into account time at risk (or exposure time) yield much more accurate estimates of recidivism." *Id.*

[8] These rates compared with a 32% rate of charges for new sex offenses, 25% rate of new convictions for sex offenses, and a 23% rate of imprisonment for new sex offenses. Prentky, *Recidivism Rates*, at 644. The use of a simple percentage thus resulted in underestimation of reoffense rates by 38 to 39%. *Id.*

Twenty-six percent of rapists were charged with a new sexual offense "with an average of 4.55 years . . . before reoffense." *Id.* at 642. The failure rate calculated on this basis was 39%. *Id.*

[9] The study also found with respect to rapists that if it had "restricted our follow-up to the convention[al] . . . period of 12 or 24 months, we would have erred by approximately 30% or 25%, respectively." Prentky, *Recidivism Rates*, at 645. Moreover, use of a five-year period would have resulted in "miss[ing] approximately 20% of the new charges." *Id.*

offenders to reoffend." Prentky, *Recidivism Rates*, at 656. And as explained above, other studies suggest a similarly high rate of recidivism. *See id.* at 653.

Thus, while some sex offenders do not reoffend, many do. Predicting whether a particular sex offender is likely to re-offend is, however, a matter of great complexity as there are numerous factors of both a static and dynamic nature that may be relevant in making this assessment. *See, e.g.*, R. Karl Hanson & Andrew Harris, Department of the Solicitor General of Canada, *Dynamic Predictors of Sexual Recidivism* 3 (1998) (available at http://www.sgc.gc.ca/epub/corr/e199801b/e199801b.htm). The difficulty is compounded by the inchoate nature of the criminological and scientific research. *See* R. Karl Hanson, Department of the Solicitor General of Canada, *The Development of a Brief Actuarial Risk Scale for Sexual Offense Recidivism* 3 (1997) (available at http://www.sgc.gc.ca/epub/corr/e199704/e199704.htm) (noting that "[t]here have been few attempts to develop objective risk scales specifically for sexual offense recidivism"). As Prentky concludes, "there is no reliable body of empirically derived data that can inform and guide decisionmaking about reoffense risk." *Child Sexual Molestation*, at 9.

The Constitution does not require state legislatures to wait for scientific experts conclusively to analyze every category of sex offense[10] and every aspect of the problem of

[10] For example, some studies suggest that incest offenders have lower recidivism rates than other categories of offenders. There is, however, substantial research which has found that "victims with close relationships with the perpetrators are least likely to report sexual abuse." Kim English *et al.*, Colorado Dep't of Pub. Safety, *The Value Of Polygraph Testing In Sex Offender Management* 33 (2000) (discussing studies). Given the disruption that intervention of the criminal justice system entails and the power relationships that frequently exist within families, this is not a surprising conclusion. Moreover, despite the "common myth . . . that

recidivism before acting to protect their citizens. Indeed, "[t]he pre-diction of future [sex offender] behaviour can never be done with certainty since people and circumstances can and do change." Prentky, *Child Sexual Molestation*, at 2. *See also* Hanson, *Development of a Brief Actuarial Risk Scale*, at 2.

II. ALASKA'S SEX OFFENDER REGISTRATION ACT IS A REGULATORY PROGRAM AND DOES NOT IMPOSE PUNISHMENT UNDER THE *EX POST FACTO* CLAUSE

The *ex post facto* clause """forbids the application of any new punitive measure to a crime already consummated."""" *Kansas v. Hendricks*, 521 U.S. 346, 370 (1997) (quoting *California Dept. of Corrections v. Morales*, 514 U.S. 499, 505 (1995)) (other citation omitted). The Court has made clear, however, that the clause "pertain[s] exclusively to penal statutes." *Id.* As relevant here, its protections are triggered only if the Alaska Act "'changes the punishment, and inflicts a greater punishment, than the law annexed to the

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incest offenders perpetrate their crimes only against family members," several studies have found that a substantial portion of incest offenders have committed sex offenses against non-family members. *Id.* at 36.

A recent study of incest offenders who were subjected to polygraph examinations found a high degree of such cross-over offending. Thus, while only 4.8% of the offenders admitted to committing offenses against a non-family member before polygraphy, afterwards 34.6% admitted to committing offenses against non-family members. *Id.* at 38. And while only 9% of these incest offenders admitted to having adult victims before polygraphy, afterwards 35% admitted to having adult victims. *Id.* at 37. *See also* Gene G. Abel *et al.*, *Multiple Paraphilic Diagnoses among Sex Offenders*, 16 Bull. Am. Acad. Psychiatry L. 153, 163 (1988) ("contrary to traditional belief, incestuous child molesters are or have been involved very frequently with children outside the home").

crime, when committed.'" *Lynce v. Mathis*, 519 U.S. 433, 441 & n.13 (1997) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)).

In making this determination, the Court looks first at a statute's purpose to determine whether it creates a valid civil regulatory regime or retroactively increases punishment. *See Hendricks*, 521 U.S. at 361. The Court has made clear that it "will reject the legislature's manifest [regulatory] intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). The Court has further explained that "when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'" *Id.* at 360 n.3 (quoting *Jones v. United States*, 463 U.S. 354, 370 (1983)); *see also id.* at 375 (Breyer, J., dissenting) ("The Constitution permits a State to follow one reasonable professional view, while rejecting another."); *Jones*, 463 U.S. at 364 n.13 ("The lesson we have drawn is not that government may not act in the face of . . . uncertainty [in the field of psychiatry], but rather that courts should pay particular deference to reasonable legislative judgments.").

As explained below, the court of appeals disregarded these principles and improperly substituted its own policy preferences for those of the Alaska legislature. Its judgment should accordingly be reversed.

A. ASORA Is Not A Punitive Statute

The court of appeals correctly concluded that the Alaska legislature "acted with a non-punitive intent" when it enacted ASORA. Pet. App. 11a. Indeed, the Alaska legislature specifically found that "sex offenders pose a high risk of reoffending after release from custody," that "protecting the

public from sex offenders is a primary governmental interest," and that the "release of certain information about sex offenders to public agencies and the general public will assist in protecting public safety." *Id.* at 10a-11a (quoting 1994 Alaska Sess. Laws 41, § 1). As the court below correctly recognized, "these findings demonstrate that the legislature viewed the Act as a measure designed to accomplish a non-punitive purpose, protecting the public through the collection and release of information." *Id.* at 11a.

The court of appeals nonetheless rejected the Alaska legislature's "manifest intent" and held that respondents had met their "heavy burden" of providing "'the clearest proof'" that ASORA is punitive in effect. *Hendricks*, 521 U.S. at 361 (quoting *Ward*, 448 U.S. at 248). Applying the seven-factor test from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963),[11] the court acknowledged that "[t]hree factors"—the absence of a scienter requirement, the fact that similar statutes "have not historically been regarded as punishment," and ASORA's non-punitive purpose of protecting public safety—"suggest that the Act is not punitive." Pet. App. 29a. The court then proceeded, however, to discount these factors, largely because of its view that ASORA is "so broad and sweeping." *Id.* at 30a; *see also id.* at 29a.

While the court reasoned that the four remaining factors supported its holding that ASORA is punitive, two factors

[11] The *Mendoza-Martinez* factors are:

> whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable to it, and whether it appears excessive in relation to the alternative purposes assigned . . . .

372 U.S. at 168-69.

were particularly significant. *Id.* at 28a. The first was its conclusion that the statute imposes a "substantial disability" on sex offenders, which "is exacerbated by the public notification provisions that . . . exposes [*sic*] all registrants to world-wide obloquy and ostracism." *Id.* The second was its conclusion that ASORA is "excessive in relation to its non-punitive purpose" because of "the undifferentiated scope of the Act" and the "severity of the disabilities it imposes." *Id.* at 28a-30a.

As explained below, the court's holding is based on its erroneous characterization of the statute's registration and disclosure provisions. Moreover, the court's conclusion that ASORA is excessive in relation to its purpose (which is based on its repeated and exaggerated invocation of the disability factor), also makes several simplistic and erroneous assumptions regarding the predictability of sex-offender recidivism. While a State may elect to limit public disclosure of sex-offender registration information based on an offender's perceived risk of reoffending, there is ample evidence which supports Alaska's approach. In any event, where, as here, a State legislature acts in response to a problem of manifest concern, the *ex post facto* clause does not require that empirical evidence support every aspect of the legislative approach.

B. ASORA Is Not Punitive In Effect

ASORA's registration provisions serve a legitimate regulatory function. "Sex crimes flourish in secrecy [and] [s]ex offenders have secretive and manipulative lifestyles. . . ." English, *Managing Adult Sex Offenders in the Community*, at 2. "The vast majority of sex offenders are released eventually" to the community, where they are presented with the opportunity to reoffend. *See* Prentky, *Child Sexual Molestation*, at 8. "[M]anag[ing] sex offenders in the community to

contain them" is thus essential to protect the offenders' previous victims and potential new victims. *See* English, *Managing Adult Sex Offenders in the Community*, at 2.

Requiring sex offenders to register with law enforcement authorities prior to their release from prison and upon moving into, or within, the State, serves this protective purpose in two critical ways. First, it alerts authorities to the presence of a sex offender in their jurisdiction. Second, it alerts the sex offender to the fact that the authorities know where the offender lives and works, as well as the motor vehicles to which the offender has access. Registration thus reduces the ability of an offender to operate in secrecy, an environment conducive to the commission of new sex offenses.

The court of appeals further ignored that ASORA is an integral part of a national program to track the whereabouts of sex offenders. Under the act, sex offenders must also notify the authorities when they move out of the State, *see* Alaska Stat. § 12.63.010(c), and Alaska authorities must notify both the FBI and law enforcement authorities in "the state where the sex offender . . . is moving of the sex offender's . . . intended address." *Id.* § 12.63.030(a); *see also* 42 U.S.C. § 14071(b)(2) (requiring "[t]he State law enforcement agency [to] immediately transmit the conviction data and fingerprints to the Federal Bureau of Investigation") & (b)(4) ("The . . . law enforcement agency shall, if the person changes residence to another State, notify the law enforcement agency with which the person must register in the new State, if the new State has a registration requirement.").

The Court has frequently recognized the highly mobile nature of modern society. *See, e.g., Saenz v. Roe*, 526 U.S. 489, 498-501 (1999). Moreover, as explained above, research clearly establishes that many sex offenders commit recidivist acts for decades after their release. *See* discussion *supra* at 12 (finding that some offenders commit acts 20 years after release). Exempting the large number of offenders who

committed sex offenses before the 1994 effective date of Alaska's statute (as well as those of every other State) on the ground that registration violates the *ex post facto* clause would severely curtail an important national program to track the whereabouts of released offenders.[12]

The court of appeals thus discounted the important remedial interests of Alaska as well as every other State in protecting their citizens. To reach this result, the court reasoned that ASORA's registration requirements are "onerous," Pet. App. 13a, 14a, 19a, and impose an "extremely burdensome" and "substantial disability" because they "require in-person registration at a local police station where registrants must provide detailed information four times each year for life in the case of some defendants and annually for 15 years in the case of others." *Id.* at 28a; *see also id.* at 30a. Moreover, the court likened the registration obligations "to the duty imposed in a judgment of conviction on other defendants to report regularly to a probation officer or to comply with the conditions of supervised release." *Id.* at 19a-20a.

The court of appeals' analysis is based on an erroneous construction of the statutory language, which, as the court acknowledged, "on its face, does not clearly specify that these registrations must be made in person at local police stations." *Id.* at 7a n.4.[13] In fact, the registration provisions applicable

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[12] While under the Ninth Circuit's analysis the registration obligations of other States may survive constitutional challenge, *see Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998), the court's invalidation of ASORA poses a substantial threat to the national scheme. If Alaska sex offenders who committed their acts prior to ASORA's enactment are not required to register, these offenders will be able to move to other States without giving notice to Alaska officials. In turn, Alaska officials will not be able notify other States that Alaska offenders have moved into their jurisdiction.

[13] The court of appeals based its misreading on Alaska's representation at "oral argument that periodic in-person registration at local police

to each category of sex offender state that "[a] sex offender . . . required to register . . . *shall* . . . *provide written verification to the department* . . . of the sex offender's . . . address and notice of any changes to the information previously provided . . . ." Alaska Stat. § 12.63.010(d)(1) (emphasis added); *see also id.* at § 12.63.010(d)(2) (referring to "written verification"). Furthermore, in an informational pamphlet, the Alaska Department of Public Safety clearly states that "[t]he initial registration must be done in person. Notices of change of address, annual and quarterly verifications may be done by mail." Sex Offender/Child Kidnapper Central Registry, Alaska Department of Public Safety, *Information Pamphlet Concerning Sex Offender/Child Kidnapping Registration in Alaska* (2001) (available at http://www.dps.state.ak.us/nSorcr/pdf/SORPamphlet.pdf).[14]

The court of appeals' construction of ASORA's registration requirement is thus patently erroneous. After the initial registration, the periodic written verification and updating required upon "chang[ing] residence" impose a minimal burden on offenders, which is consistent with the regulatory nature of the scheme.

Moreover, ASORA's requirements do not remotely approach the conditions or restrictions typically imposed on an offender placed on probation or granted supervised release. ASORA does not prohibit a sex offender from

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stations is required by the Act." Pet. App. 7a n.4. The State has explained that its lawyer's representation was a mistaken response to a question at oral argument regarding whether ASORA requires registrants to "'go to the police station' for their annual or quarterly registrations." *Id.* The State subsequently made clear to the court of appeals that its lawyer had made a mistake and other documents indicate that the State does not construe the statute as requiring in-person verification. *See* Pet. for Rehearing en Banc (9th Cir., dated Apr. 20, 2001) at 10-11.

[14] This pamphlet is provided by the Department of Public Safety "for information purposes only" and refers users to Alaska Stat. § 12.63.

engaging in any activity or require compliance with any condition other than registering and updating or verifying information. For example, it does not require that the offender make periodic visits to supervising officers, obtain approval of employment or choice of residence, submit to polygraph testing, "abide by a curfew," "comply with electronic monitoring," "maintain a driving log," "abstain from alcoholic beverages and participate in periodic drug testing," or participate in "treatment with a therapist." English, *Managing Adult Sex Offenders*, at 5. Nor does it prohibit offenders from "frequent[ing] places where children congregate," "hav[ing] contact . . . with . . . victims," "driv[ing] a motor vehicle alone without prior permission," or "possess[ing] any pornographic, sexually oriented, or sexually stimulating" material "relevant to [the offender's] behavior pattern." *Id.* ASORA's registration and verification obligations thus bear no resemblance to the conditions and restrictions that typically accompany probation or parole. *See* Leonard Orland, *Justice, Punishment, and Treatment* 485-86 (1973) (reproducing parole certificate); *id.* at 491 (listing parole conditions).

ASORA likewise does not impose "an 'affirmative disability or restraint,' as that term is normally understood." *Hudson v. United States*, 522 U.S. 93, 104 (1997). ASORA does not prohibit an offender from voting, holding public office, or bar an offender from a profession or holding an occupational license. *See Hawker v. New York*, 170 U.S. 189 (1898); *see also DeVeau v. Braisted*, 363 U.S. 144 (1960).[15] Moreover, ASORA does not subject sex offenders to commitment to a facility for treatment. *See Hendricks*, 521 U.S. at 363. The

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[15] In *Hudson* the Court held that debarment from a profession does not "involve an 'affirmative disability or restraint.'" 522 U.S. at 104 (citation omitted). The Court has long held that retroactive occupational debarment does not impose punishment in violation of the *ex post facto* clause. *See Hawker*, 170 U.S. at 200.

obligation to register and periodically verify "is 'certainly nothing approaching the "infamous punishment" of imprisonment.'" *Hudson*, 522 U.S. at 104 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)).

Notwithstanding that ASORA does not prohibit any conduct other than failing to register, verify, or update address information upon moving, the court of appeals reasoned that the statute's notification provision also "impose[s] an affirmative disability" because it "subjects [sex offenders] to community obloquy and scorn that damage them personally and professionally." Pet. App. 14a. The court further stated that ASORA "procedures . . . are likely to make the plaintiffs *completely* unemployable." *Id.* at 16a. The court of appeals assumed that because "Alaska publishes the names and addresses of the registrants' places of employment on its sex offender internet site, and makes it simple for users of the site to search for the presence of any sex offenders working at a particular place of employment[,] . . . it creates a substantial probability that registrants will not be able to find work, because employers will not want to risk loss of business when the public learns that they have hired sex offenders." *Id.*

This conclusion is faulty for several reasons. First, while compliance may result in the loss of some employment opportunities, the entries of numerous registered sex offenders indicate that they have obtained employment notwithstanding that ASORA has been in effect for nearly a decade. These entries negate the court of appeals' assumption that ASORA is "likely to make the plaintiffs *completely* unemployable." *Id.* at 16a. The fact that one sex offender suffered a loss of business attributable to ASORA's public access provision, *see id.* at 14a-15a, does not establish the court's hypothesis of a consumer boycott rendering all sex

offenders completely unemployable.[16] It likewise ignores the existence of employment opportunities in businesses that do not sell directly to the public.

Second, insofar as some sex offenders are denied certain employment opportunities, this condition does not arise from a statutory prohibition on employment but from the decisions of private employers. Difficulty obtaining employment has long been a consequence of a conviction for a serious felony. Indeed, many employers conduct criminal background checks of prospective employees. Moreover, the records of judicial proceedings, including records of convictions for a crime, are public records in Alaska. *See* Alaska Admin. Code tit. 13, § 68.310. While Internet publication makes a sex offender's criminal history more readily accessible, and thus may prompt more employers to use the registry, the State is not responsible for the disinclination of many employers to hire convicted felons. Internet publication thus does not impose "an 'affirmative disability or restraint,' as that term is normally understood." *Hudson*, 522 U.S. at 104.

The court of appeals also reasoned that ASORA imposes a disability because it "exposes all registrants to world-wide obloquy and ostracism." Pet. App. 29a. This argument is not persuasive. While Internet publication allows people anywhere in the world to view the entries in Alaska's sex offender registry, the court's contention ignores that the sex

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[16] The court of appeals observed that "the record contains evidence that one sex offender subject to the Alaska statute suffered community hostility and damage to his business after printouts from the Alaska sex offender registration . . . website were publicly distributed and posted on bulletin boards." Pet. App. 14a-15a. *Hawker*, however, establishes that the *ex post facto* clause is not violated by a statute retroactively barring a felon from a lucrative profession. *See* 170 U.S. at 200 (barring convicted felon from practicing medicine); *see also Hudson*, 522 U.S. at 104 (holding that debarment from participating in banking industry was not punitive).

offense information merely relates the historical fact of a conviction obtained through procedures that provide substantial safeguards. Moreover, the court did not explain how those persons who live outside Alaska and have no contact with an offender can engage in ostracism merely by viewing Alaska's website or how an offender can feel ostracized by persons thousands of miles away whom he has never met.

C. ASORA's Lack Of Individualized Risk Assessment Does Not Render It Punitive

In holding that ASORA is punitive in effect, the court of appeals also concluded that the statute is "excessive in relation to its public safety purpose," Pet. App. 23a, because its application to an offender is not limited based on an individualized assessment of the risk that an offender will engage in recidivism. *See id.* at 23a-27a, 29a. ASORA's lack of risk-based assessment does not render the scheme punitive because individualized risk assessment is not a constitutionally required precondition of sex offender registration and disclosure schemes. *Cf. Hendricks*, 521 U.S. at 360 n.3 (quoting *Jones*, 463 U.S. at 365 n.13) ("when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation'"). The court of appeals' decision erroneously assumes a degree of predictive accuracy that is not supported in the literature and ignores research which supports Alaska's approach. The faulty premises which underlie the court's reasoning demonstrate why difficult and controversial policy decisions such as this one should be made in legislative bodies, which have superior fact-finding capabilities, rather than the courts.

The first of these is the undue faith the court of appeals placed in clinical assessment of the respondents. In particular, the court observed that a state court had granted Doe I custody of his daughter based "on the findings of psychiatric evaluations concluding that Doe I has 'a very low risk of re-

offending' and is 'not a pedophile.'"[17] Pet. App. 4a. *See also id.* at 27a (explaining that even though "Doe I was successfully rehabilitated" and that "a state court determined that he was not a pedophile, and that he posed a very low risk of reoffending. . . . Doe I would be forced to submit to" the statute).

In contrast to the court of appeals' view, there is substantial research which suggests that individualized risk assessments have low predictive accuracy. R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 Psychol., Pub. Pol'y, & L. 50, 54 (1998). One expert writes that "[a]lthough clinical predictions of risk are routine in many fields, the accuracy of these risk assessments has been unimpressive." *Id.* (citations omitted). In this expert's view, "[t]he clinical prediction of sexual offender recidivism is no exception." *Id.* Hanson and another expert have concluded that "the average predictive accuracy of professional judgment to predict sex offense recidivism is only slightly better than chance." R. Karl Hanson & David Thornton, *Static 99: Improving Actuarial Risk Assessments for Sex Offenders* (1999) (available at http://www.sgc.gc.ca/epub/Corr/e199902/e199902.htm); *see also* Hanson, *Sex Offender Risk Assessment*, at 54.[18]

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[17] Contrary to the assumption of the court of appeals, "[t]he majority of incest abusers—whether they are men or women—are not true pedophiles. Nevertheless, they can be addicted to sex, and a significant number also sexually assault children outside their families." Freeman-Longo, *Sexual Abuse in America*, at 42.

[18] There is some evidence suggesting that clinical assessments which are structured to review a standardized list of risk factors have greater predictive accuracy than unguided clinical assessments. *See* Hanson, *Sex Offender Risk Assessment*, at 55. Hanson found an average correlation of .23 for guided clinical assessments versus a correlation of .07 for unguided assessments. *See id.* There is, however, "no explicit method of translating combinations of individual risk factors into overall recidivism

Moreover, while it has been suggested that actuarial methods of risk assessment are superior to clinical prediction, *see* Virginia Criminal Sentencing Commission, *Assessing Risk*, at 14 (summarizing literature), "[a] longstanding controversy exists within the field of psychology over the relative merits of actuarial (or statistical) versus clinical predictions." Thomas R. Litwack, *Actuarial Versus Clinical Assessments Of Dangerousness*, 7 Psych., Pub. Pol'y, & L. 409 (2001). In any event, although "researchers have made significant advances in risk assessment procedures" with respect to the prediction of "general criminal recidivism," Hanson, *Sex Offender Risk Assessment*, at 50, "these general measures have not been particularly effective in predicting sexual recidivism." *Id.* at 52. In part, this is because "[t]here has been relatively little empirical research on how best to combine risk factors for sexual offenders." *Id.* at 62; *see also id.* at 63-64 (discussing use of various actuarial scales).

The current actuarial methods—which rely principally on static factors—have at best moderate predictive accuracy with respect to sex offenses.[19] *Id.* at 63-64. These scales, however, "cannot even claim to address all the relevant static risk factors," *id.* at 65, and "a reliable set of dynamic risk factors has yet to be established." *Id.* at 68. As Hanson further explains, "[t]he research on dynamic risk factors for sexual offenders is just beginning, and many of the effects need to be replicated before they can be confidently used to predict

probabilities" and "[n]one of the individual risk factors are sufficiently discriminating to justify their use in isolation." *Id.* at 62.

"Correlation coefficients can range from –1 to +1, with 0 indicating no predictive accuracy and values farther from 0 indicating greater predictive accuracy." *Id.* at 53. Thus a correlation of +1 indicates a perfect positive correlation between variables and –1 indicates a perfect negative correlation.

[19] The correlations range from .20 to .33. *See* Hanson, *Sex Offender Risk Assessment*, at 63-64.

risk." *Id.* Thus, "the research on actuarial measures for sexual offense recidivism has yet to demonstrate a clear superiority to the best clinical assessment methods." *Id.* at 53.

As the foregoing demonstrates, there is substantial research which challenges the court of appeals' assumption that predictions of sex-offender recidivism can be made with a high degree of accuracy. To be sure, it may be possible to devise risk assessment procedures which can determine those offenders with the highest risk of reoffending with a high degree of predictive accuracy. *See, e.g., Assessing Risk Among Sex Offenders In Virginia*, at 89-90.[20] However, to the extent the threshold for classifying an offender as a high risk is set at a high level to "reduc[e] the rate of false positives," it may "lower the rate at which recidivists are accurately identified by the model." *Id.* at 91. Faced with the uncertainty inherent in predicting sex offender recidivism, a State can reasonably choose—as Alaska has—to make relevant information available to its citizens without an individualized risk assessment. That a State does so does not make its scheme punitive.

The fact that "recidivism [rates] vary considerably depending on the specific sex offense committed," Pet. App. 25a n.10 (citation omitted), likewise does not make ASORA a punitive scheme. Indeed, respondents, who were each charged with multiple acts of incest against their children, *see*

[20] In developing its risk assessment scale, the Virginia Criminal Sentencing Commission "chose as its operational definition of recidivism a new arrest for *any crime against a person*, including any new sex offense." *Assessing Risk Among Sex Offenders In Virginia*, at 44 (emphasis added). The instrument is thus not solely a predictor of sex offense recidivism. *See* Hanson, *Sex Offender Risk Assessment*, at 50-51 (noting that "[t]here is no longer any serious debate about whether general criminal recidivism can be predicted" and "there appear to be some differences between the factors that predict sexual offenses and the factors that predict other types of violence").

Brief for Appellees at 4 (9th Cir.), have made no showing, let alone provided "'the clearest proof,'" *Hendricks*, 521 U.S. at 361 (citation omitted), that ASORA's application to them does not serve a legitimate regulatory purpose. Even if it could be conclusively established that the recidivism rate for incest offenders was substantially below that of non-incest offenders, whether such offenders should be subject to registration and disclosure is a matter for legislative determination.

CONCLUSION

The judgment of the court of appeals should be reversed.

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